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THE NEXT GREAT STEP IN JURISPRUDENCE

"The law has got to be stated over again, and I venture to say that in fifty years we shall have it in a form of which no man could have dreamed fifty years ago."—Justice Holmes, 1886.

I.

THE CONDITION OF JURISPRUDENCE.

The ultimate goal of jurisprudence is the production of a uniform system of law for a united people in order that all persons having a common allegiance shall have a common law, simple, easily understood and readily ascertainable.

The need of a logically co-ordinated system of law, uniform throughout the United States, so far as conditions and needs are identical, is now admitted with practical unanimity by all jurists and statesmen.

The necessity for such a work has been felt in every system of law and to condense and simplify the law has been the effort of many law-givers and jurists. Hon. U. M. Rose, lately president of the American Bar Association, says: "A desire to simplify the law has fired the ambition of several distinguished rulers. * * * Cæsar himself had a scheme of that sort; Justinian and Napoleon each left an eternal legacy as the result of their efforts in that direction."

Sir Francis Bacon sought the support of King James, saying: "Of the laws of England I have commended them afore for the matter, but surely they ask much amendment for the form, which to reduce and perfect I hold to be the one of the greatest dowries that can be conferred upon this kingdom."

Lord Chief Justice Hale's analysis was not the first effort, but he was the first to display a comprehensive and logical synoptical outline under which could be arranged every principle and every rule of English law.

Dr. Wood, in his Institutes, was the first to enlarge this scheme and to arrange the body of principles and rules under such an outline. Blackstone's Commentaries carried this attempt on identical principles and outlines to the extent to which the effort towards system had gone at the period of the American Revolution.

It should be borne in mind that Blackstone's Commentaries constituted the general visible outline of the English Constitution and laws, and was so recognized without dissent by all American publicists, and this, as has been frequently remarked, has been the real influence, preserving the essential harmony and unity of our system of law.

The desideratum of the accomplishment of this great design has not generally been recognized, and for that reason legislators and reformers have been floundering for the last half century with attempts and with measures which have as a rule, when put to the practical test in most instances, resulted in still greater confusion. The desideratum has been and is a logical and comprehensive plan of classification in accordance with which the various rules and principles which make up the *corpus juris*—the body of the law—with the precedents showing their reason and history and illustrating their application, can be arranged and stated and in this manner the whole *corpus juris* be made to present itself as a co-ordinated system.

With such a system conflict could not long exist, because two conflicting rules, even though legally operative in different jurisdictions, would not long survive direct contrast in immediate juxtaposition.

Mr. Justice James Wilson was the first American jurist who has left any public record upon this subject, but, unfortunately, he left no formal outline and did not state any general principle upon which he proposed to proceed. He, however, stated that the arrangement could not be alphabetical and must be logical and, in various parts of his works, indicates his belief in the application to our law of the general principles of logical classification. It is clear that he approved and intended to adopt the principles of the classical jurists who have followed the main

outline of the Roman civilians, modifying and changing the visible outline to conform to the American system of law and government.

Bearing in mind that Wilson closed his career, so far as this subject is concerned, before Washington's administration ended, we may readily understand that the tendency toward confusion had not then set in, as it did after the year 1800, when the people of the different States began to regard each State as an independent sovereignty, but Wilson foresaw the inevitable tendency and need for a check.

By the year 1820 the condition of affairs began to be serious. As early as 1823 Nathan Dane said: "A serious evil we are fast running into in most of our States. This inundation of books made in different States and nations will increase until we can shake off more of our local notions. Our true course is plain; that is, by degrees to make our laws more uniform and national, especially when there is nothing to make them otherwise but *local feeling and prejudice*. We have in the common and federal law the material for national uniformity in many cases. We have a national judiciary, promoting this uniformity, and we have lawyers, learned, industrious and able, to second the judiciary. *We want only a general, efficient plan, supported with energy and national feeling.*"

All will recognize that Dane here states one obstacle which, until long since the war, could not be overcome. That is, that local feeling and prejudice, so long as it existed, was an obstacle which prevented the desire for uniformity while business conditions and transportation facilities were in such a state as to render the need less imperative than at present.

The other desideratum was one which might be furnished at any time by any person or body of men capable of such a performance and willing to submit to the years of study and the drudgery of detail essential to the creation of a plan which would be a real induction resulting from a conscientious and careful study of all the materials involved. At the present day, the needs essential are (a) a plan comprehensive, logical, practical, (b) "supported with energy and (c) national feeling."

The element of energy, practically speaking, in plain English, is simply the financial support which sustains large co-operative effort.

Less than four decades ago the people of the United States became a united nation. Before that time they were so only in theory and in name. Their unity was a legal fiction, made much of in prosecuting a common cause against a common enemy, but ignored on every occasion calling for the seeming self-sacrifices involved wherever local self-interest was called upon to yield something to the common good. This was not confined to any section of the country. During the last half-century, however, the evolution towards accord and actual harmony has been constant and has been accelerated with a gathering momentum by those instrumentalities which have been gradually annihilating time and distance. As is always the case, the statement of the law has not kept pace with changes in sentiment and conditions. On the contrary the rapid development has fostered confusion. Externally the laws of the various States seem to present a medley of contradictions, a chaotic assortment of incongruous ideas, and all our comprehensive books designed to cover the whole field, are thrown together in utter disregard of all scientific principles of arrangement and expression.

Intrinsically, the condition is better than the surface indications show. In the domain of jurisprudence, relating to the nature of our national organism, the period of bitter controversy has passed. Here and there may be heard the echo of some ancient dogma; here and there some political partisan or some cloistered doctrinaire still seeks to apply ancient theories to modern conditions There is still some conflict upon minor points, but, upon the whole, the fundamental questions of our law are so well settled and so generally understood as to be ready to yield to the sifting of science for the purpose of logical organization and exposition. Mr. Waite states a truth which any one, who will take the pains to examine our whole body of law, will corroborate: *"There is a remarkable harmony in the general principles of American law.* There are discrepancies and contradictions in some instances, but notwithstanding these, it may be regarded as settled that *there is a great uniform, settled system of American law."* (Actions and Defences, Preface.)

II.

SCIENTIFIC CONSOLIDATION THE REMEDY.

The function of practical jurisprudence is to sift out and make available by visible expression in logical relation what is valuable

in the accumulated mass of ancient principles, novel doctrines and modern rules, eliminating those which have become wholly obsolete and innocuous; in other words, to keep the actual law knowable and to guide and guard the expression of law in its formation. This process is now made possible by the judicial and catholic spirit which is manifest on every hand. It is retarded by that spirit which is ever present, always the same, and always maintaining that that which is is the best attainable. The genius of conservatism is always to be overcome. There is an inertia in matters intellectual as well as in matters material. The exponents of what they call "the conservative view" invariably resort to an argument which, to them, is all powerful, but which is, in fact, the weakest ever advanced; that is, that it is impossible to do this or to do that, and in all cases means no more than that the asserter himself does not see the way; therefore, there is no way. Every forward movement in civilization, art, and science, has had to overcome this same guardian of the intellectual pillars of Hercules, this same spectre which always stands warning those who would venture beyond known regions, that further progress is impossible, while, in truth, *progression is inevitable.*

If we extend our reflections, we may see that the struggle is a conflict between the empiricists and the institutionists. The empiricists insist that there is no system; that every phenomenon is an isolated event, or, at best, that the one branch is a system by itself and every topic complete in itself. In this manner the empiricist reaches the pinnacle of his aspirations when he achieves the proud designation of *"Specialist."*

The institutionists, on the other hand, maintain that jurisprudence exists; that it is a science, and that its practical application will reduce any body of municipal law to a plain, simple system, unembarrassed by the breadth of domain, elaborateness and minuteness of legislation or the number of rules and precedents. *The talisman, the touchstone, the guiding principle in this science, as in every other, is analysis and classification.*

Classification is clearly the basis of logical science; classification is an essential part of the definition of jurisprudence; classification is an essential part of the work of codification and of systematic consolidation. It is by means of classification and concise statement that any complex mass is reduced to system. System is the creator of simplicity. Falck, a distinguished German jurist, says:

"Three things are requisite in order that the representation of the rules of law recognized in a country may really deserve the name of a Science. *First,* the principles of Right and Law must be so completely treated, that no jural relation shall remain unexplained, at least in its essential points. *Second,* the grounds upon which the jural truths rest must be convincingly developed. *Third,* and finally, the arrangement of the whole system must be carried out, even in its individual parts, according to the principles of its internal essential connection, and not merely in accordance with an arbitrarily chosen scheme. The scientific character of the system consists in the union of these three qualities: Completeness, Depth or Fundamentalness, and Order."

The solution of our present difficulties depends upon the recognition of a few simple facts and great principles. American law is an integral system. Its contradictions result from the remnant of local prejudice and divers conceptions of fundamental theories and public policies; or, in other words, *a confused and indefinite conception of that body of jurisprudence which, in the nomenclature of the law, is spoken of as the Common Law.* The conception of this body of rules and principles has become so variant and confused that it is no longer presented as a rational and coherent system, and used as the framework of our legal edifice: It is imperative that the common law be given definite and clear statement in such a manner that it can be said that there is a body of unwritten principles and rules common throughout the whole country with reference to which all other law is construed. Judge Dillon expresses the thought:

"The forecast may be ventured that while the law will, in its development, undoubtedly keep pace with the changing wants of society, yet the work of jurists and legislators during the next century will be pre-eminently the work of systematic restatement of the body of our jurisprudence. Call it a code, or what you will, this work must be done. If not done from choice, the inexorable logic of necessity will compel its performance." * * * *This work, as important, as noble as any that can engage the attention of men, will fall to the profession to do, since it cannot be done by others.* It rests, therefore, upon the profession as a duty. *It will not be performed by men whose sun, like mine, has passed the zenith, and whose faces are already turned to follow its setting."*[1]

When this is accomplished we will possess what our ancestors practically had when they could refer to one system of rules expounded by a single system of courts as of some selected date.

[1] Law & Jur., 386-7.

The common law is now as variant as the varied talents and learning of a great variety of judges; like the old idea of equity, it is "all one with the Chancellor's foot."

It should not be overlooked that the statutory adoption of the English common law always designates some date or period.

Once the common law is again reduced to a rational and uniform system, so expressed and so generally acquiesced in that we can fairly say that we have a definite common law, the uniformity of the statute law will follow as a consequence. Until there is a common understanding of the common law, the identical words of statutory enactment mean the same or different things according to the judicial conception of the common law. A careful study of the matter will convince most men that this is the rock upon which the attempts at the codification of the law or parts of the law have broken, for let it be understood that in codification the *principles* which constitute the reason of the law are not expressed; they are implied as part of the common law. The *precedents* which illustrate the application of the rules are not indicated, whereas the meaning of the statute in all cases depends upon the conception of these two elements, and so a code is never, even to its framers, complete in itself.

The body of our law is not so vast as many are led to suppose by reason of the seeming vastness of the written records in which it is enveloped. The vast and widely scattered material embraces a comparatively small body of rules and principles capable of being brought into clear light and stated in a reasonable compass. Many persons suppose that we have a variety of law, corresponding with the number of jurisdictions applying it. That is, that we have fifty systems of law. But all those are equivalent systems, in outline identical and in the main substantively alike. Truly, we have some divergence of construction, interpretation and application, but, on a given point, proposition or rule, there is, in most cases, uniformity, and it is very seldom that there exist more than two conflicting rules upon an identical proposition.

Occasionally there is an idiosyncrasy of doctrine which might be classed as an anomalous rule, but exposing these to contrast in juxtaposition soon draws them together, and many jurists have remarked upon the tendency of the present generation to uniformity and the growing habit of acquiescing in the decision of

the Supreme Court of the United States on rules of general application.

Our endeavor should be to reduce the heterogeneous mass to an organized system, exorcising the obsolete rules, bringing conflicting precedents into sharp contrast in order that the more reasonable rules shall ultimately prevail. Systematic consolidation is the means. The end desired is to establish uniformity in law (that is, one rule applicable to the same conditions everywhere), clearness in expression and this within reasonable compass, with an arrangement rendering everything readily accessible.

III.

THE ACTUAL LAW MUST BE DISENTANGLED FROM THE OBSOLETE MATTER.

By our system of reporting, the mass of decisions called precedents, beginning with the year books, is preserved with religious care and, until recently, was regarded with blind veneration. In recent years it has become apparent that, because of the divergencies and contradictions, precedents cannot any longer be relied upon *unless they are at the same time in conformity with some established, recognized principle.* Changes in business conditions or public policy render a constantly increasing proportion of this mass obsolete, overruled and entirely useless until, at the present time, by far the largest part of the entire mass is obsolete and of mere historic interest. Of the American cases, it is safe to say that the greatest part are already overruled or modified or their analogy is destroyed by changes in conditions. These observations indicate that whoever attempts to know or to express our law must not attempt to restate the whole mass of rules to be found in our reports and which, at various times, has been the law.

Actual law is the quest of the courts and the lawyers, for it is the actual law which rules. This actual law lies imbedded in a vast conglomerate of precedents and, like the golden nuggets of the mine, is concealed by the refuse accumulated by the surge and grind of shifting civilization.

The practical side of the science of law is to keep the actual law in plain view and easy of access. The actual law should be extracted from the mass and given exclusive place in the main text of the books of the law. Jurisprudence will commend itself

to the rank and file when and to the degree that it performs this service. The task which lies before the present generation is to provide the system whereby the actual law can be separated from the obsolete and placed in the foreground.

IV.

LOGICAL CLASSIFICATION AND CONDENSATION REQUIRED.

Accessibility of any part of a large mass requires separation and arrangement; that is, classification. The creation of a system by classification is the solution—but what system, and how is it to be created? Obviously, the one most adapted to simplicity, compactness and completeness. The alphabetical arrangement has been tried. It is still being used and is making its inadequacy palpable. Every jurist of note, who has given serious attention to this subject, has declared that the solution depends upon a logical system of classification under which to arrange the body of principles, rules and precedents. It cannot be too much emphasized that alphabetical arrangement is not classification, but is the very opposite. It is a mere method, without a principle; it is the veriest empiricism; it allows orthography to dominate logic; it segregates integral subjects; it obscures the relations of things; it renders a system impossible; it has rendered our law chaotic; it has almost eradicated jurisprudence.

Professor Holland says:

"It may be safely said that no code or digest from the Code Theodosian to the Code Civil of Lower Canada has, as yet, been tolerably well arranged. Not one shows any conception of the mutual relation of the great departments of law; not one is governed by the logical principle of dichotomy, which, though it may not be always visible, yet should underlie and determine the main features of any system of classification."

Jurists and statesmen are awakening to the proposition that the key to this difficult situation is something outside of the positive law itself—a something over and above law, namely, the processes of jurisprudence and the special process known as classification. This may be shown by the following quotations, to which many similar ones could be added.

Judge Dillon writes:

"The present want of our substantive law is an authoritative, scientific and comprehensive arrangement of its vast and scattered materials—a work which is yet in its formative stages.

What has thus far been projected has made but little real advance and has not always proceeded on the right plan or principles. Our laws and jurisprudences must be analyzed and resolved into their constituent principles and these must be arranged according to their own nature. The resulting arrangement will, necessarily, be as unique and distinctive as the materials with which it deals. It cannot be recast except to a limited extent, in moulds furnished by the civil or continental law."

Professor Sheldon Amos, in his discourse, *An English Code,* writes:

"The conception of a proper system is that of placing into a scientific framework every part of the law, whether common or statute, until the result is that every legal rule is somewhere embraced in the form of a legal proposition. In the process of constructing such a system—whether it be called a code or a compendium, the arrangement of the whole must precede the parts. * * * When the Conception of the Whole has been once fully grasped and adequately expressed, the careful elaboration of the several parts will involve much of the very same process of digesting by a number of hands which, *prior to a scheme of the whole being resolved upon and mapped out, is so much waste toil.* Mr. Austin, almost translating Thibaut, says: 'The project must be the work of one. The general outline, the work of one might be filled up by divers.' * * * *It is assumed by the ablest advocates of codification that some basis of theoretical classification is the basis of codification."*

The opinion of one of our most practical jurists has peculiar weight from the fact of his wide and varied theoretical study and practical experience, and from the further fact that he assisted in the creation of the alphabetical arrangement now in use in digests and encyclopedias. The late Austin Abbott, shortly before his death, wrote:

"One of the chief defects in legal writings and compilations at the present day is imperfect classification. The immense multiplicity of authorities requires thorough analysis and classification, lest we be lost in a labyrinth of contrasts. *Imperfect classification is not merely a defect in the results of research—it is a hindrance in the process of research."*

V.

JURISPRUDENCE MUST BE PUT TO PRACTICAL USES.

In the domain of law it is plain that the point has been reached where, in order that there be a real comprehension, the multitude of axioms, decisions, constitutions, statutes and customs which

make up the body of written and unwritten law must be subjected to scientific treatment and exposition.

Holland, on the first page of his work on Jurisprudence, says:

"The difficulty of the subject is due less to the multiplicity of its details than to the absence of general principles under which these details can be grouped. In other words, while legal science is capable of being intelligently learned, isolated facts are capable of being only committed to memory."

In order, then, that this domain be treated by a scientific method, it is necessary, first, to create or discover some scientific system of investigation and exposition. In other words, we must discover what that science we call Jurisprudence really is, and how we must go about applying it in order to attain the practical end of reducing the *corpus juris* to a simple, clear and comparatively concise system of rules and principles.

Jurisprudence may safely be affirmed to be a logical science, having for one of its principal functions the arrangement or classification and statement of the principles, doctrines and rules of law, *i. e.,* the creation of a visible *corpus juris.*

Historical jurisprudence is sometimes spoken of, but obviously such an expression as "historical jurisprudence" means no more than *historical investigation,* having for its object the ascertainment of facts. Jurisprudence, properly so called, involves two processes, analysis and synthesis; these are the elements of classification and no modern definition can be found which does not involve, as the central element and process, the logical process of classification.

This contrast between historical investigation and scientific exposition is quite clearly indicated by Justice Holmes in an address before the Boston University Law School. He says:

"Perhaps I have said enough to show the part which the study of history necessarily plays in the intelligent study of the law as it is to-day. In the teaching at this school and at Cambridge, it is in no danger of being undervalued. In England the recent *History of Early English Law,* by Sir Frederick Pollock and Mr. Maitland, has lent the subject an almost deceptive charm. We must beware of the pitfall of antiquarianism and must remember that, for our purposes, our only interest in the past is for the light it throws on the present. I look forward to the time when the part played by history in the explanation of dogma shall be very small and, instead of ingenious research, we shall spend our energy on a study of the end sought to be obtained and the reasons for desiring it. * * * There is another study which

sometimes is undervalued by the practical minded for which I wish to say a good word. I mean the study of what is called Jurisprudence. Jurisprudence, as I look at it, is simply law in its most generalized part. Every effort to reduce a case to a rule is an effort of jurisprudence. *Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house.* The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as impracticable, for, to the competent, it simply means going to the bottom of the subject."

VI.

WHY CODIFICATION HAS FAILED.

A consideration of the reasons for the failure of attempts at codification hitherto made will enable us to bring more clearly into light the principles which must govern in the next great step which, whether we will or not, inevitably must be taken.

Bentham and Austin inaugurated, in apparently different fields, movements in the direction of the establishment of an orderly system of law, intended to be complete and simple. They accomplished what may have seemed to themselves very little, and they passed from the field of their activity, leaving it apparently little affected by their efforts. Bentham and Austin labored in the same field but in different ways. Neither was entirely right and neither was fully equipped for the accomplishment of his purpose. Bentham's main design was essentially chimerical and, yet, his efforts have done much for the cause of law reform. Austin's leading conceptions were, in the main, essentially correct and the indirect result of his labors has been very great. John Austin had the misfortune to be judged by a half-done task. The lack of physical strength prevented him from exhausting the materials of the two great fields essential to investigation; namely, the field of metaphysical, *i. e.,* logical, jurisprudence and the field of practical, existing law. The cause of failure—or, rather, the lack of complete success, of both Bentham and Austin was not the infusion of too many ideas imbibed from the sources of civil and continental jurisprudence, but the exclusion of essential principles of English law not to be put aside for the idea of codification, even under the specious name of law reform.

The case of Mr. David Dudley Field, and his attempt to impose codification upon American jurisprudence, is quite different. His defeat in many contests in that forum, as well as the failure in

the practical operation of the codes he caused to be adopted, is due to other causes. These are, first, a lack of attention to the essential principles which must be observed in planning a code or any elaborate system by means of which to express the law; for it should always be remembered the main object of codification or of any exposition desirable at the present day *is not the invention of new law,* but better expression of that which exists. It comports better with the deference which should be paid to this truly great man to have these reasons expressed by another, and that other himself an advocate of codification.

Sheldon Amos, in his book, *An English Code,* thus states these reasons:

"*In the first place,* the principle of preparing the whole code at once and from a single point of view, so as to insuré harmony of plan and unswerving consistency in the use of terms, was violated at the outset. The conception of the code entertained by the commissioners was not a scientific system, compelling all the heterogeneous element of existing law to enter into compartments judicially mapped out, but a republication of the statute and common law on such principles of classification as might do as little violence as possible to the methods and language adopted in the common text books. *The difference in fact between these two conceptions is unspeakably wide.* * * * The general faults of the New York 'Civil Code' are such as might have been anticipated from the imperfect conception of a code."

"Apart from occasional scraps of terminology and arrangement borrowed from Justinian's Institutes and the *Code Napoleon,* the whole work reproduces, in an utterly undigested form, the notions and the very phraseology in which the English law is clothed in the most hastily compiled text books."

"If a code purports to be an exact reproduction, in a systematic form, of an actual system of law, it is some disparagement to that code if it affixes *new meanings to terms,* or amplifies old meanings, in a way wholly alien to the common language of the law presumable codified."

"The utter unserviceableness of the whole class of definitions on which that of property rests is transparent at every point."

"*The language, on so essential a matter as this (contract) is simply inconsistent with itself, and vacillates between the loose style of popular dialogue and the somewhat stricter phraseology of common text books.*"

"The above faults and shortcomings in the New York Code have been pointed out simply in order to guard the English public and the legal profession against the temptation to construct, under a sudden impulse, a worthless code."

It will be observed that none of these criticisms militate against codification. The inherent fault of codification, as applied to English and American law, lies in another direction; it has been so often stated that it needs but a summary of the positions: Codes are always but partial statements of the law. The common law is never stated but is assumed to inhere in the language used and to *exist unexpressed,* and consequently modifies the application. The body of principles is never expressed. The precedents throwing light on the language used are not made accessible.

LOGICAL CLASSIFICATION, NOT LEGISLATIVE CODIFICATION, IS REQUIRED.

It does not follow because a reform which has in it an alien principle is rejected, that the good and adaptable principles should be also rejected. *The one essential principle of codification and of Austin's philosophy is classification.* Of its principles Bentham knew little, while Austin knew much; he had drunk deep at the spring of that philosophy established by Aristotle, and deepened and widened by modern scholars and which being applied to the law by the great philosophical jurists constitutes jurisprudence.

Bentham advocated something which Englishmen and Americans do not want. Austin accomplished much toward perfecting the first great step in the great movement of setting law in order, which English and American law must have.

VII.

THE FUNDAMENTAL FACT.

Austin's great achievement was not the first step in jurisprudence; that had been taken centuries before him and, in his own country, had been followed in a practical way by Hale, Wood, Blackstone and others. His great achievement was the making plainer than had ever been done before that *there is a universal jurisprudence to which all systems of law must needs tacitly conform.*

As Amos points out, the utility of this conception once understood and acted upon cannot be exaggerated.

Professor Amos says:

"There are few students of English law who are unaware that the most finished and characteristic portion of the works of the late Mr. Austin is occupied with ascertaining the limits of the

province of jurisprudence. It is not easy to exaggerate the importance of the task itself, and it would be superfluous to dwell upon the acuteness and laboriousness with which it was carried out—however imperfect as a vehicle of the author's total thoughts was the practical shape which his speculations chanced to take. Mr. Austin established once for all, as has been already intimated, with a decisive clearness which none of his rivals in this or any other country have equalled, that *in all systems of law—to whatever period or form of civilization they may belong—there are certain definite and lasting conceptions, the constant reappearance of which can ever assuredly be counted upon, and which are capable of being expressed in the terms of an universal language.*"[2]

This was not unknown to others. Judge Dillon quotes Sir William Jones as follows:

"The student of the law will constantly observe a striking UNIFORMITY AMONG ALL NATIONS, whatever seas or mountains may separate them, or how many ages soever may have elapsed between the periods of their existence. IN THOSE GREAT AND FUNDAMENTAL PRINCIPLES, which, being clearly deduced from natural reason, are equally diffused over all mankind, and are not subject to alteration by any change of place or time."[3]

John Austin made the matter plainer and indicated its logical connection with a natural classification. Jurists are now able, because of the increased facility for observing all the various forms of civilization, to make the induction that, irrespective of the varying forms of government and the differing details of the various departments of law, as they exist in different countries, they all present a uniform outline almost as distinct and almost as similar as the skeletons of the various races.

There are in all nations the family relations, the relations of government and people, the regulations of property, the system of remedial justice, and the code of criminal punishments. To restate these ideas—there is, in the jurisprudence of all civilized nations:

First, those fundamental regulations which constitute the people a political society, and regulate the governmental relations:

Second, the law governing family relations and the rules incident thereto;

Third, the regulations governing the acquisition and transmission of property;

Fourth, the system of remedial justice; and,

[2] An English Code, p. 205.

[3] Law & Jurisprudence, p. 137.

Fifth, the code of criminal law by which the public restrains and punishes.

Without stopping to explain or argue, it is safe to affirm that all these fell naturally—that is, logically—under the formula worked out by the Greek and Roman philosophers, which we find stated by Gaius, that "all our law relates to Persons, Things and Actions," and that all subdivisions of the law subordinate to the five primary divisions first above stated take their places without conflict and without repetition under the subdivision *in accordance with a single fundamental principle.*

Austin's achievement never reached the extent of his obvious design, and modern jurisprudence has not progressed in the practical application of theoretical jurisprudence much beyond the models which existed before Austin's theories were made public. That is, it may be said of both Austin and Bentham that their attempts never reached the stage of practically applied jurisprudence. The reason is obvious, and we have that reason pointed out by one who, having passed through the stages of theoretical jurisprudence, now occupies a place in the highest judicial tribunal of the land.

Mr. Justice Holmes, in an article in *The Harvard Law Review,* says:

"Sir James Stephen is not the only writer whose attempts to analyze legal ideas have been confused by striving for a useless quintessence of all systems instead of an accurate anatomy of one. *The trouble with Austin was that he did not know enough English law.*"

But this master is quick to add that theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house, and it is to be said for Austin that he perhaps realized as clearly as any that he was but taking the first great step and that before practical results could be shown it was necessary to subject the actually existing specific body of English law to just such a process as Judge Dillon indicates, where he says, "Our laws must be analyzed and resolved into their constituent principles and these must be arranged according to their own nature," and, as Amos adds, "placing all these into a scientific framework until the result is that every legal rule is somewhere embraced in the form of a legal proposition."

This, as above indicated, Professor Austin never lived to do. But who can doubt that, had his health and strength permitted, he would have attempted it?

VIII.

THE MANNER OF ACCOMPLISHMENT.

The next great step in jurisprudence is the practical application of scientific principles to our specific system of American law. Our task is to display an accurate anatomy of American law, extending it even to minute details.

Theoretical learning, such as Austin displayed, while absolutely essential, is not enough. In addition to that scientific and theoretical knowledge, whoever attempts to construct a practical scheme of classification must become a master of the detail rules in every branch of law. Whatever principles of classification are made use of, the visible synoptical outline of classification must conform to the internal conditions of our American system of law.

The conclusion from all this is that the general outline must be a result—*i. e.*, an induction—drawn from the detailed examination of typical elements of every part of our law, viewed and considered in the light of the principles of classification made use of. No scheme of theoretical classification drawn up in advance of this detailed examination can be anything more than an experiment. An attempt to enter upon the detail work of compiling and arranging the specific rules, principles and precedents in advance of the carefully worked out, comprehensive plan of classification can amount to no more than mere empiricism.

With the plan of classification worked out by the writer of this article, explained in the report on "Classification of the Law," before the American Bar Association,[4] the practical application of which is illustrated in his commentary on American Law,[5] the problem presented by this enterprise is not one yet wholly to be solved, and the project is something more than a mere hope that someone will arise to produce a plan suitable for so great an undertaking.

It may be stated that, in the course of the twenty years during which that plan and its illustration was under construction, every known plan was carefully considered, and the result is believed to accord with the great principles of classification adapted to our institutions and our law.

Not that the author of this plan of classification, nor any of those cooperating with him, would indulge the hope that the plan is

[4] See Am. Bar. Assn. Rept., Vol. 25, pp. 425-475 [1902].

[5] First Ed., 1900; 2nd Ed., 1908. See Review, 2nd Ed. Green Bag, Vol. XXI, pp. 104-110.

perfect, or would assume to impose it upon the body of men who could be asked to co-operate in creating the larger work, but that it serves as a starting point; a visible example, with which other systems can be contrasted and which, with the advice, assistance and effort of the jurists, may be fashioned into a logical, practical, working plan.

Intelligent, systematic, practical work upon so stupendous a task and involving such a vast mass of material requires something more than merely a plan, however perfect that may be. The practical working out of this great enterprise requires that system shall govern every process involved.

There are conceived to be the following different processes, every one of which must be governed by a logical system, carefully worked out:

First—The system of classification above spoken of, giving order, showing the relative connection of subjects, avoiding repetitions, assuring completeness, clearness and conciseness.

Second—A system of research, aiding in collecting the materials, ensuring the possession of the actual law, avoiding the insertion of obsolete rules.

Third—A system of examining cases, ensuring the citation of cases in point and materially reducing the bulk of ordinary citation.

Fourth—A system of citation, facilitating historical research, ensuring exhaustive citation of cases which now rule the courts, and enabling the persons using the books to refer to all the cases, from the earliest times.

Fifth—A system of constructing the text, focussing all the law upon every proposition.

Such a system, applied throughout the whole work, will render our whole law quickly accessible to anyone.

IX.

A MORE COMPLETE TREATMENT CAN BE GIVEN IN TWENTY VOLUMES THAN IS NOW GIVEN IN FORTY:

Provided, the *text* is devoted entirely to law; no *text* space is wasted by padding it with obsolete rules; the citation is not padded with a mass of cases, supporting elemntary rules; repetition is carefully avoided by the plan; the citation is of cases in point where the question was actually involved and really decided.

That such a hope is quite reasonable is shown by the view of so practical a legal scholar as the late Austin Abbott, who writes:

"The current legal language, as used, is as clumsy and burdensome as are the plows and harrows of two centuries ago compared to the implements of to-day. *A thorough master of the English language could put three or four pages into one; could express all the ideas of several paragraphs in as many sentences;* and by this *condensation,* contradictions would be brought into contrast, inconsistencies exposed and the distinction between settled law and debatable questions forced upon the attention."

X.

THE ONLY REMAINING OBSTACLE.

At this point we encounter the only real obstacle which lies in the way of this great movement.

Individual effort, be it never so capable; and the plan, however comprehensive, simple and scientific, cannot accomplish so great a task. *Power is as important as the capacity and the plan.* Constructive genius and the efficient plan must have the support of *dynamic energy* and national feeling.

Reason and the examples of history teach us that a great work of the character indicated, which will constitute for the American people an edifice similar to that erected by Tribonian and his associates, requires co-operation and support similar to that which Justinian furnished. This financial support constitutes the *dynamic energy. The plan is as important as the power.* Napoleon never compiled a code. Napoleon supplied the "energy and national feeling." Aristotle could not have accomplished his great work without the support furnished by his patron, Alexander the Great. Alexander, with his vast resources, and Aristotle, with his "constructive genius and organized body of scholars," created the first great university of the world, wherein the master minds laid the foundation of modern learning and civilization. Indeed, the excellence of the Roman law rests largely upon its connection with this Grecian philosophy. *The power is as important as the plan.* BOTH ARE ESSENTIAL.

Judge Rose says:

"Writing more than fifty years ago, Mr. Spence said, 'What may be effected when some modern Tribonian shall appear with the capacity and power of compiling the now almost countless volumes of law into a rational and uniform system of juris-

prudence, unfettered by merely casual and technical principles, it would be idle at present even to hazard a conjecture."

And of course, all such expressions about one man doing such a task is never true to the fact. Co-operation is essential.

It takes no great faculty to predict what such a man, or any efficient body of men, would accomplish. It is perfectly clear that, without sufficient financial support, they must fail in the full realization of the hope of accomplishing any such grand conception. Individual effort can create a commentary, but cannot construct a full and complete statement of the *Corpus Juris*. Co-operation in some form is essential, and this must be provided in the only practical way. The work cannot be and should not be regarded as the work of one man, nor should any one man assume to dominate any part of it.

The finished product must be fashioned in accordance with the strictest logic, constructed out of the material which has life and vital existence, tried by experience and perfected by the criticism of the master minds of the profession. This work, thus performed, will, in the language of Lord Bacon, constitute "one of the greatest dowries that can be conferred upon this nation." Such a work will of necessity exert a great and lasting influence upon the civilization of the world. It is said by *The Independent*, in its issue of March 3, 1910:

"The success of the project is contingent upon the establishment of the suggested foundation for the advancement of jurisprudence. Here is an opportunity which should satisfy the highest kind of altruism. Greater service can hardly be rendered to our nation or to civilization." While a foundation is, no doubt, the ideal method of support, other practical methods are obvious. The work is clearly one of national importance and is deserving of the active cooperation of the legal profession in its creation and the hearty support of all with energy and natural feeling.

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